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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE EDUARDO GONZALEZ, Defendant and Appellant.	G042284 (Super. Ct. No. 06CF3303) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jose Eduardo Gonzalez of first degree murder (Pen. Code § 187, subd. (a); all further statutory references are to the code unless otherwise stated), shooting at a vehicle (§§ 189, 246), and active participation in a street gang (§ 186.22, subd. (a)). The jury also found true the murder was a drive-by shooting (§ 190.2, subd. (a)(21)) committed for a street gang (§ 190.2, subd. (a)(22)), and defendant personally used a firearm causing death (§ 12022.53, subd. (d)) and committed the crime to benefit a street gang (§ 186. 22, subd. (b)(1)). Defendant was sentenced to life without parole plus 25 years to life. Defendant raises three arguments on appeal. First, the trial court erred by instructing the jury on transferred intent because there was insufficient evidence to prove he intended to kill a specific person. Second, the evidence was insufficient to support his conviction for active participation in a street gang. Finally, the prison priors were not found true or admitted and should be stricken for all purposes. We reject the first two arguments and affirm the judgment but agree as to the prior prison terms and order they be stricken.

FACTS AND PROCEDURAL HISTORY

An argument broke out between two groups of men, described as gardeners and gang members, respectively, in an alley of a neighborhood in San Juan Capistrano. The argument escalated into violence as the gang members started hitting the gardeners with weapons including a rake, a fire extinguisher, and a bat. Amado Montalvan, whose gang moniker was "Pit Bull," arrived at the scene in his pickup truck; when he got out of the truck he was beaten. Javier Chavez, a neighboring resident who heard the fight, offered to help Montalvan move his truck. After Chavez got into the truck, a Honda stopped in front of it with its passenger side window parallel to the truck's driver side window. A person in the car yelled "Fucking Paisas," and fired three shots at the truck's driver side window. The victim was fatally shot.

Police pursued the car as it sped away and found it abandoned. Police concluded defendant, a member of the "Varrio Viejo" (VV) gang, was the driver of the car and the gunman. Defendant was charged with first degree murder under two theories: (1) it was willful, deliberate, and premeditated, and (2) it was committed by intentionally firing a gun from a motor vehicle at another person outside the vehicle with the intent to kill.

Roberto Gonzalez, Jr., a friend and neighbor of defendant, testified he had known defendant for a couple of years, and his brother lived with defendant until the time of the shooting. According to Roberto's testimony about a conversation with defendant, defendant received a phone call from a "homie[]" on the night of the shooting, went to the alley, started firing a gun, and "shot the guy" inside a truck or car. Roberto further testified, "During the altercation . . . another individual was gonna shoot Pit Bull's father, and Pit Bull got between the shooter and his father, and [defendant] got mad because it was none of his business, and he got in[]between what was going on, so he felt that he wanted to get Pit Bull or get the father."

Statements of Brandy Werner, a friend of defendant, from a police interview were admitted. Defendant told Werner the "guy . . . was up to no good, sitting in his truck," and "[h]e was transporting people back and forth to the fight."

DISCUSSION

1. Standard of Review

In reviewing an insufficiency of the evidence claim, "we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every act the trier

could reasonably deduce from the evidence. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) "Unless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.)

2. Jury Instruction

The prosecutor requested jury instructions on transferred intent. Referring to Roberto's testimony regarding the shooting, the prosecutor reasoned, "A different individual got into the pickup truck at the time, may have been a mistaken identity, shooting at Javier Chavez, who was in the pickup truck. The intent may have been to kill the owner of the pickup truck." Although defense counsel did not object, he argued that Roberto's testimony was ambiguous as to whether defendant or another person "wanted to get" Montalvan.

The court instructed the jury that defendant has been prosecuted for first degree murder under two theories: 1) the murder was willful, deliberate and premeditated, and 2) the murder was committed by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle with the intent to inflict death. As to the first theory, the court instructed: "The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death." (CALCRIM No. 521.)

For the second theory, the court instructed: "Defendant is guilty of first-degree murder if the People have proved that the defendant murdered by shooting a

firearm from a motor vehicle. The defendant has committed this kind of murder if: [¶] One, he shot a firearm from a motor vehicle, [¶] Two, he intentionally shot at a person who was outside the vehicle, and [¶] Three, he intended to kill that person." (CALCRIM No. 521.)

The court also gave to CALCRIM No. 562: "If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed."

The Attorney General argues defendant's challenge to this instruction was forfeited, because defendant failed to object it. Although failure to object to the giving of an instruction generally precludes review (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192), we may review an instruction without an objection, if it affects defendant's substantial rights (§§ 1259, 1469; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146), as is the case here.

Defendant argues there was no substantial evidence he intended to kill Montalvan and only mistakenly killed Chavez. He asserts Robert's testimony was unclear as to who "wanted to get" Montalvan, defendant or someone else. Further, even if defendant "wanted to get" Montalvan, it was unclear whether "wanted to get" meant he intended to kill. Finally, even if defendant intended to kill Montalvan, there was no evidence defendant knew Montalvan owned a truck.

Any conceivable error in giving a transferred intent instruction is harmless. Simply put, the statute does not require the prosecution to prove defendant intended to kill any specific person; it only requires an intent to kill.

The relevant portion of section 189 under which defendant was convicted provides: "All murder which is perpetrated . . . by any . . . willful, deliberate, and premeditated killing . . . or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with

the intent to inflict death, is murder of the first degree." Nowhere in the statute is the intent to kill a designated person mentioned.

Cases interpreting the statute also have not required proof of defendant's intent to kill a designated person. In *People v. Bland* (2002) 28 Cal.4th 313, the California Supreme Court cites with approval to Justice Mosk's concurring opinion in *People v. Scott* (1996) 14 Cal.4th 544, 555, which he "rejected the 'assumption' that 'malice aforethought exists in the perpetrator only in relation to an intended victim.' [Citation.]" "'[T]here is no requirement of an unlawful intent to kill an intended victim.'" (*Ibid.*, italics omitted.) He reasoned "'[t]he law speaks in terms of an unlawful intent to kill a person, not the person intended to be killed.' [Citation.]" (*Ibid.*, italics omitted; *People v. Scott, supra*, 14 Cal.4th at p. 555 (conc. opn. of Mosk, J.).)

Defendant argues the instruction enabled the jury to find intent, but the words of the transferred intent instruction do not instruct or imply that intent has been established. Instead, the jury was instructed, pursuant to the standard instruction on transferred intent: "If the defendant intended to kill one person but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed." (CALCRIM No. 562.) The first clause expressly conditions the application of transferred intent upon the jury finding defendant intended to kill. Only after finding such intent to kill would the second clause apply to allow the jury to transfer defendant's intent to kill the specified person to the actual victim.

Moreover, the transferred intent instruction was given following the instructions on both theories of murder. Under the theory of premeditated murder, the jury was instructed "[t]he defendant acted willfully if he intended to kill." Under the alternative theory of murder by means of discharging a firearm from a motor vehicle at another person outside of the vehicle with the intent to inflict death, the "provision by its very terms incorporates an express intent to kill requirement." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We presume jurors understand and follow the court's instructions.

(*Ibid.*) The instructions as a whole properly instructed the jury to find intent to kill before considering transferred intent.

a. Premeditation Killing

Defendant argues that without the transferred intent theory, the evidence presented does not support conviction under either theory of first degree murder. As defendant points out, *People v. Anderson* (1968) 70 Cal.2d 15, identified three categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning, (2) motive, and (3) manner of killing. (*Id.* at p. 27.) *Anderson* also observed that judgments are more readily affirmed when there is evidence falling within each of the three categories. Otherwise there must be at least substantial evidence of planning or evidence of motive plus either planning or method of killing. (*Ibid.*)

Defendant argues there is insufficient evidence of any of these elements here. But "'*Anderson* does not require these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide [our] assessment whether the evidence supports an inference the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.*)* ""'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*Ibid.*) But here there is sufficient evidence in all three categories to support a finding of premeditation and deliberation.

First, defendant's strategic alignment of his passenger side window with the truck's driver side window is planning directly related to the killing. Further, defendant was having dinner and watching television until he was called upon to "handle business." "Premeditation can be established in the context of a gang shooting even though the time

between the sighting of the victim and the actual shooting is very brief. [Citation.]" (*People v. Sanchez, supra,* 26 Cal.4th at p. 849.) The jury could reasonably have concluded that upon seeing the victim in the truck, defendant planned the killing and implemented such plan by aligning the vehicles to allow accuracy in shooting at the victim.

It also could have reasonably found defendant premeditated in the time it took to get to his car and drive to the scene of the crime, even if it took only a few minutes. Defendant argues the shooting occurred in a chaotic melee, showing little planning activity by defendant. But, "'[p]remeditation and deliberation can occur in a brief interval. "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"' [Citation.]" (*People v. Sanchez, supra,* 26 Cal.4th at p. 849.)

Second, there is sufficient evidence of motive. Motive evidence is "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim. . . ." (*People v. Anderson, supra,* 70 Cal.2d at p. 27.) Werner told police defendant said the driver of the truck was "up to no good." This suggests defendant harbored animosity toward the driver of the truck. Another witness testified defendant wanted to kill the owner of the truck. Defendant yelled, "Fucking Paisas" before firing three shots. "Paisas" is a demeaning term used to refer to people newly arrived in the country. This suffices to show motive.

Contrary to defendant's argument he had no motive to kill because he had no prior relationship with the victim, his motive stems from animosity toward the driver of the truck. Moreover, defendant's planning to kill whoever drove the truck exemplifies premeditation and deliberation. "'A studied hatred and enmity, including a preplanned, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable[] kind of premeditation

and deliberation.' [Citation.]" (*People v. Sanchez, supra,* 26 Cal.4th at p. 849, italics omitted.)

Third, there is sufficient evidence "the manner of killing [w]as the result of calculation" (*People v. Anderson, supra,* 70 Cal.2d at p. 29) as shown by alignment of the vehicle so three shots could be fired at the driver. We reject defendant's arguments one could infer an indiscriminate intent to scare or injure the driver by recklessly spraying shots in the truck's vicinity and only one of the three shots actually hit the victim.

b. Firing Weapon From Vehicle

Under the second theory, defendant may be convicted if: 1) he shot a firearm from a motor vehicle, 2) he intentionally shot at a person who was outside the vehicle, and 3) he intended to kill that person. (§ 189.) As to the first two elements, there is no dispute defendant fired a gun from his car into the truck. Evidence of intent to kill was discussed above.

Defendant argues the court should not have given an instruction on transferred intent (CALCRIM No. 562) because there was insufficient evidence to support it. We disagree. "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

Roberto testified defendant intended to kill Montalvan or his father. Roberto had been defendant's neighbor for three years. Additionally, he grew up with the VV gang, of which defendant was a member. Roberto's brother, Jesus Gonzalez, also was living with defendant until the murder occurred. Given the relationship between defendant and Roberto and the supporting testimony of Werner, the jury could have reasonably believed in Roberto's testimony that defendant intended to kill Montalvan, but through a mistaken identity killed Chavez.

3. Sufficiency of the evidence

Sheriff's detective Craig Lang testified he had investigated several hundred crimes committed by the VV gang. VV operates in the San Juan Capistrano area, which includes the alley in which the shooting occurred and has been in existence since the early 1970's. As of August 2006 when the shooting occurred, it had approximately 150 active members. VV's primary activities are drug sales, felony vandalism, robberies, and assaults with deadly weapons, including attempted murders. Predicate offenses of VV were robbery and carjacking, both in 2004.

Lang knew defendant personally and was also familiar with him from reviewing reports and interviewing other VV members regarding his gang status. In 2001, defendant admitted committing gang-related crimes since he was around nine years old. Lang found 18 other reports of defendant either being with other VV members or inside VV gang territory.

Defendant has several gang-specific tattoos, including "S.J.C.," a common name for VV, "Old Town," and "Capistrano," and other generic tattoos, such as "O.C.," and "No warning shots fired." Lang testified that some of these gang-specific tattoos are earned. At Werner's residence, Lang found a banner with the name S.J.C., and a roster with names of VV members, including "Bandit," which Lang testified was defendant's moniker.

Based on the totality of the case, including his personal knowledge of defendant and of defendant's tattoos, and other background information, Lang was of the opinion defendant was an active and well-respected member of VV as of the date of the shooting.

When the prosecutor asked Lang a hypothetical question based on facts of this case, he gave his opinion that the offense was committed for the benefit of the VV gang. Other members were fighting because they felt disrespected by the people described as gardeners, and such disrespect requires retaliation. He testified, "the

disrespect had to be retaliated so to make everything all good within the gang and within the community."

Section 186.22, subdivision (a) punishes: "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ."

Although defendant does not dispute that the two prior predicate crimes of other VV gang members account for a pattern of criminal gang activity he contends there is insufficient evidence he knew the two VV gang members who were convicted of the predicate criminal offenses, or that he knew they were part of and were committing crimes for VV. In addition, even though he does not dispute his membership and active participation in the gang, at the time of the shooting VV had approximately 150 members and it was reasonable that he did not know about convictions of members. We disagree.

"'The word "knowing" as used in a criminal statute imports only an awareness of the facts which bring the proscribed act within the terms of the statute. [Citation.]' [Citation.]" (*People v. Lopez* (1986) 188 Cal.App.3d 592, 598.) '"Reliance on circumstantial evidence is often inevitable when, as here, the issue is a state of mind such as knowledge.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 379.)

In interpreting the statutory requirement of knowledge, "we strive to ascertain and effectuate the legislature's intent." (*People v. Loeun* (1997) 17 Cal.4th 1, 8.) "Because statutory language 'generally provide[s] the most reliable indicator' of that intent [citations], we turn to the words themselves, giving them their 'usual and ordinary meanings' and construing them in context [citation]." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) The statute punishes one who "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang. . . ." (§ 186.22, subd. (a).)

Here, defendant's active participation, Street Terrorism Enforcement and Prevention (STEP) notices he received, rank and status in the gang, and knowledge of the fight on the night of the shooting support the jury's conclusion that defendant "actively participate[d] in [VV] with knowledge that its members engage in or have engaged in a pattern of criminal activity." (§ 186.22, subd. (a).) "This 'active' participation must require knowledge of the gang's primary activities; this is axiomatic and included in the statutory language." (*People v. Gamez* (1991) 235 Cal.App.3d 957, 974, disapproved on another ground in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10.) Defendant may not or may know of the specific offenses committed by other VV members, but the importance is that he was informed of the criminal nature of the gang by the STEP notices, and he was notified of the gang's current engagements on the night of the shooting. Even if defendant did not have knowledge of the specific offenses committed by other VV members, he nevertheless knew of the criminal offenses committed on the night of the shooting, which qualified as a "pattern of criminal gang activity."

A "pattern of criminal gang activity" is defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" the felonies enumerated in the statute, "provided at least one of these offenses occurred . . . within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e); *People v. Gardeley*, *supra*, 14 Cal.4th at p. 616.) A current offense that is an enumerated activity is considered a predicate offense. (*Id.* at p. 625.)

Defendant's knowledge of the events on the night of the shooting satisfies the statutory requirement. Solicitation of any of the enumerated felonies under section 186.22, subdivision (e), in this case shooting at a vehicle occupied by another person (§ 186.22, subd.(e)(5)), qualifies as a predicate offense. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 616.) Defendant was solicited by another VV gang member to "take care of

business" on the night of the shooting. Since defendant's own conduct on the night of the shooting also qualified as a predicate offense, the statutory requirement of two or more predicate offenses are met.

Even if defendant was not solicited to commit the shooting, he knew upon arriving at the scene that the other VV gang members were engaged in assault with a deadly weapon by using rakes and bats, another enumerated felony under section 186.22, subdivision (e). Defendant argues given the chaotic melee, he did not have such knowledge, but the jury could reasonably have concluded otherwise based on the evidence. He drove to the scene and aligned his vehicle with the truck, so he had enough time to observe the men were fighting with weapons.

4. Prior Prison Terms

The information alleged pursuant to section 667.5, subdivision (b) that defendant had three prior prison terms for drug offenses. (Health & Saf. Code, §§ 11350, 11351.) Prior to trial, the court granted a defense motion to bifurcate the prior prison allegations. The first trial ended in a mistrial. In the second trial no prior prison term was admitted or found true. The court ordered the priors be "stricken for sentencing purposes."

Defendant contends and the Attorney General concurs that since the prison priors were neither admitted nor found true, they must be "stricken for all purposes" and not just merely "for sentencing purposes." Therefore, the prison priors shall be stricken for all purposes. But since neither the minutes nor the abstract contains this part of the sentence, no correction is needed.

DISPOSITION

The judgment is affirmed. The prior prison terms shall be stricken for all purposes. No correction is needed on the minutes or the abstract of judgment as neither contains any reference to the prior prison terms.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.